No. 2887

United States Circuit Court of Appeals

For the Ninth Circuit.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

ANNA F. FRESCOLN,

Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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Counsel for defendant in error argues that the recoveries under the survival and death statutes are in different rights. Thus on page 3 of his brief he says:

"In the survival case every legal heir is a beneficiary of the verdict, while in the death action only the dependent relatives are the beneficiaries," etc.

This, as we fully explained in our opening brief, is not the case. The death act (Rem. & Bal. Code, § 183) provides:

"* * * When the death of a person is caused by the wrongful act or negligence of another, his *heirs or personal representatives* may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his *parents, sisters or minor brothers* who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain said action. * * *"

That the word "heirs" includes only such heirs as are mentioned in the section has been decided by the state supereme court in many cases, cited on page 11 of our opening brief. Thus in *Copeland v. Seattle,* 33 Wash. 415, 419, the court, construing sections 183 and 194, said:

"Construing these sections, we have held that the term 'heirs' meant the widow and children of the deceased, and did not include parents and collateral heirs, and that the only person who could be the beneficiaries of such an action were the wife and children of the deceased. *Graetz v. McKenzie,* 3 Wash. 194, 28 Pac. 331; *Northern Pac. R. Co. v. Ellison,* 3 Wash. 225, 28 Pac. 33, 29 Pac. 263; *Hedrick v. Ilwaco R. & N. Co.,* 4 Wash. 400, 30 Pac. 714; *Dahl v. Tibbals,* 5 Wash. 259, 31 Pac. 868; *Noble v. Seattle,* 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Nesbitt v. Northern Pac. R. Co.,* 22 Wash. 698, 61 Pac. 141; *Robinson v. Baltimore, etc. Refining Co.,* 26 Wash. 484, 67 Pac. 274."

It is true that section 183 also allows the "personal representatives" to maintain the action for wrongful death, but it is equally true that when the action is waged by the personal representatives the

fruits of the action go to the heirs expressly mentioned in the statute and not to the estate. In *Koloff v. R. Co.,* 71 Wash. 543, 549, the court said:

"This court has held that no right of recovery for wrongful death existed at common law * * * that the sole beneficiaries of the right of action are the widow and children and not the parents or collateral heirs * * * and that, *where an action is prosecuted in the name of the personal representative, it is not for the benefit of the estate, but for the sole benefit of the widow and children who share jointly in the damages recovered. Copeland v. Seattle,* 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333."

Of course, since the amendment of this section in 1909 the word "heirs", under the numerous decisions quoted, would be held to include, not only the widow and minor children, but also those beneficiaries added by the amendment of 1909, namely, "parents, sisters or minor brothers," where the deceased left no widow or issue, and while the personal representative can still maintain the action, "it is not for the benefit of the estate, but for the sole benefit of the widow and children" or, if the deceased left no widow or issue, then for the benefit of the "parents, sisters or minor brothers."

So much for the death statute. The survival statute (Section 194, Rem. & Bal. Code quoted in full on page 9 of our opening brief) provides:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, * * * but such action may be prosecuted, or commenced and prosecuted, in favor of such *wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers,*" *etc.*

In brief, under the death statute the action for wrongful death is to be prosecuted either directly by, or for the benefit of, the widow and children, or if there are no widow or children, then by the dependent "parents, sisters or minor brothers," while under the survival act the right of action of deceased survives in favor of the wife and children, and if no wife or children then in favor of dependent parents, sisters or minor brothers. It follows that neither action is for the benefit of the estate of the deceased, but that the same heirs are the beneficiaries under either section.

Counsel for defendant in error cites a number of decisions in support of his contention that two concurrent actions may be maintained, the one under the survival and the other under the death act. These decisions, we submit, do not bear out counsel's position.

The first case cited is that of *Hedrick v. Ilwaco R. & Nav. Co.,* 4 Wash. 400 (p. 6) There it was held that although the father, as administrator, had recovered a judgment for the death of his minor son under the death act involved in this action, such judgment was not a bar to an action by the father under section 9 of the Code of 1881 providing that the father may maintain an action as plaintiff for the injury or death of a child. The court allowed the two recoveries on the theory that the judgment in the action under the death act was for the benefit of the general heirs, while the fruits of the action under the special section went to the father alone; in other words, the two actions were allowed for the reason that *the two recoveries were in different rights.* The court there said in part:

"Two actions may thus spring from the same wrongful act, because two distinct injuries are thereby inflicted. But *the actions are prosecuted in different rights* and the damages are given upon different principles. The damages recovered by a parent for loss of services of a child belong to the parent in his own right and are not distributable among the heirs, and do not become a part of the estate of the deceased."

That is exactly the distinction between the Hedrick case and the case at bar. There the two actions were "prosecuted in different rights." Here the same heirs that recover under the survival act, if

counsel's contention is sustained, can again recover under the death act. That the rule is different where two statutes permit a recovery for wrongful death by the same heirs was decided by the state court in *Longfellow v. Seattle,* 76 Wash. 509, which case is reviewed at length in our opening brief on pages 15 to 17.

The case of *Swanson v. Pacific Shipping Co.,* 60 Wash. 87, (p. 6) simply holds that upon the death of a plaintiff, suing for personal injuries from which he afterwards dies, his wife and minor children are properly substituted as parties plaintiff, to recover the damages to which the plaintiff would have been entitled had he lived. There is not even a suggestion in that decision as to whether a subsequent action may be prosecuted for the wrongful death.

The case of *Thompson v. R. Co.,* 71 Wash. 436, (p. 6) simply holds that an action for personal injuries sustained by a woman resulting in death may be revived by the minor heirs mentioned in the survival statute. It does not hold that another action may be waged by the same heirs for the wrongful death.

The case of *Walters v. R. Co.,* 36 Ia. 458 (p. 6) holds that in an action by the administrator of an infant to recover for his death, the recovery of dam-

ages is limited to those accruing to the estate after the infant would have attained his majority, and that for the damages accruing before that period, the father, if living, if not, the mother, might, under the Iowa statute maintain an action. The case is similar to, and is cited in, *Hedrick v. Ilwaco R. & N. Co.,* 4 Wash. 400, 405, above cited. It will be seen that the holding of the court avoids the allowance of double damages.

In *Bradley v. Andrews,* 51 Vt. 525 (p. 6), it was held that a former recovery by the father for loss of service, etc., of his minor son, consequent on bodily injuries occasioned by the defendant, is no bar to a recovery by the father as administrator of the son, of such damages as the son himself might have recovered, for, said the court:

"The intestate, being a minor, could not have recovered anything for loss of service or for expenses of nursing and treatment. Hence, the recovery by the plaintiff, as the father, for such items of damage, in a former suit, can be no bar to his recovery as administrator in this suit, of such damdamages as the intestate himself could have recovered."

Two other Vermont cases are cited—*Westcot v. R. Co.,* 61 Vt. 440, 17 Atl. 745 (p. 6) which is not in point, and *Needham v. R. Co.,* 38 Vt. 294 (p. 15). Whatever the holding of these three earlier decis-

ions of the Vermont court, it was afterwards squarely held by that court that a judgment in an action under the survival act was a bar to an action for wrongful death.

Legg v. Britton, 64 Vt. 652, 24 Atl. 1016.

Hurst v. Detroit City Ry., 84 Mich. 539, 48 N. W. 44 (p. 6), does not decide the question raised by this appeal.

The only question considered in *Belding v. R. Co.,* 3 S. D. 369, 53 N. W. 750, (p. 6) was as to the proper party plaintiff in an action for wrongful death. The question involved in this appeal was not considered. It may be added that the Belding case was disapproved by the Washington Supreme Court in *Copeland v. Seattle,* 33 Wash. 415, 421.

The case of *Missouri Pac. Ry. Co. v. Bennett's Estate,* 5 Kan. App. 231, 47 Pac. 183, is a decision of an intermediate court of the state of Kansas holding that in the state of Kansas a right of action for personal injuries resulting in death survives to the personal representatives of the deceased. The court was not caled upon to decide, and did not decide, what the effect of the prosecution to judgment of such an action would have upon the right to prosecute a second action for the wrongful death.

The decision, moreover, is contrary to the decisions of the court of last resort of that state.

McCarthy v. R. Co., 18 Kan. 46, 52;

Martin, Ex'r. v. Railway Co., 58 Kan. 475, 49 Pac. 605.

Brodie v. W. W. P. Co., 92 Wash. 574, 159 Pac. 791, is reviewed at length on pages 24 to 30 of our opening brief.

The extent of the decision of the court in *Lehmann v. Farwell,* 95 Wis. 185, 70 N. W. 170, was that a cause of action for personal injuries resulting in death, under the Wisconsin statute, survived to the personal representative of the deceased. The decision goes no further.

In *Brown v. Ry. Co.,* 102 Wis. 137, 77 N. W. 748 and 78 N. W. 771, the court expressly refused to pass upon the question raised here, saying:

"Of course, there is no question as to whether a recovery on one claim will bar an action for the other; therefore, what is said should not be taken as deciding that question." (77 N. W. 752)

In *Hurlbut v. City of Topeka,* 34 Fed. 510, the court followed the Kansas case theretofore decided to the effect that a right of action for personal injuries survived only when it did not result in death.

Whatever was said to the contrary in the course of the decision is pure dictum.

Counsel for defendant in error has devoted a considerable portion of his brief (pp. 11-14) to quotations from various dissenting opinions from Michigan cases in spite of the fact that the supreme court of that state has definitely and repeatedly held that a recovery cannot be had both for personal injuries and the wrongful death in two separate actions.

Sweetland v. R. Co., 117 Mich. 329, 75 N. W. 1066;

Dolson v. Ry. Co., 128 Mich. 444, 87 N. W. 629;

Storie v. Elevator Co., 134 Mich. 297, 96 N. W. 569;

Rouse v. R. Co., 164 Mich. 475, 129 N. W. 719.

The case of *Fournier v. Ry.,* 122 N. W. 299, cited by counsel on page 14 of his brief, does not change this rule.

Two other cases are cited by counsel for defendant in error, one from Massachusetts (p. 6) and one from Ohio (p. 10).

Bowes v. City of Boston, 155 Mass. 344, 29 N. E. 633;

Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 83 N. E. 601.

While these cases hold that under the statutes of their respective states a judgment in an action brought under the survival statute does not bar an action under the death statute, yet an examination of the statutes of these two states will reveal, we submit, a vital distinction between such statutes and the statutes of the state of Washington; namely, that *the recovery under the survival act and the death act are in different rights.* The action under the survival act is for the benefit of the estate of the deceased, while the action under the death act is for the benefit of certain heirs named in the statute. This, we believe, will be found to be true of the statutes of every state where two actions are allowed. As we have previously shown, this is not true of the statutes of Washington. The action under either act is for the exclusive benefit of the same identical heirs. In neither case is the action prosecuted for the benefit of the estate of the deceased. It is also to be noted that in Ohio and Massachusetts the amount of recovery under the death act is limited, which is not true of the death act of Washington. While it may be granted that the legislature has the power to split the total

aggregate damages resulting from a wrongful act resulting in death by giving a part to the estate and a part to the heirs, we cannot believe that this court will hold it to have been the legislative intent to permit the same heirs to recover twice for the same negligent act resulting in the death of the injured person.

Finally counsel devotes pages 16 to 18 of his brief to an extended quotation from the case of *Northern Pac. Ry. Co. v. Adams,* 116 Fed. 324. We believe it sufficient to say that the Adams case was later reversed by the United States supreme court. *N. P. Ry. Co. v. Adams,* 192 U. S. 440, 48 L. ed. 513.

For the reasons urged in our opening brief we respectfully submit that the judgment of the lower court should be reversed.

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